UNITED STATES - COUNTERVAILING DUTIES ON CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM GERMANY

WT/DS213

COMMENTS OF THE UNITED STATES OF AMERICA ON THE EC'S ANSWERS TO QUESTIONS FROM THE PANEL

February 28, 2002

1. The United States does not intend to comment on every response by the EC to the Panel's questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on those specific responses where additional points or emphasis is warranted. First, however, there are several overarching theories or assumptions in the EC's answers that are best addressed in general.

2. In particular, the United States observes that the EC in its answers espouses a general principle that any provision of the SCM Agreement is potentially applicable *mutatis mutandis* to any other provision of the SCM Agreement.[1] According to the EC, the only limitation on this free-for-all application is that a provision must be "relevant to the issues" covered by another Article and that its application "does not create a situation of conflict or is not specifically excluded." The EC's approach to treaty interpretation turns the customary rule of treaty interpretation on its head.

3. Article 31 of the *Vienna Convention* reflects the basic principle of treaty interpretation. In particular, Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*." (Emphasis added). The EC's approach to treaty interpretation is the very antithesis of this customary rule. Rather than reading the words of a provision and interpreting them "in light of the object and purpose" of the Agreement, the EC would require Members to interpret the object and purpose and then, regardless of the plain meaning of the words, interpret those words in light of the "object and purpose" as divined by the Member. This runs afoul of the Appellate Body's admonition in *Japan – Alcoholic Beverages*, that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."[2]

4. In its answers to the Panel's questions, the EC makes various assumptions regarding the "purposes" of various provisions of the SCM Agreement without reference to the text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these "purposes." This use of "purposes" is precisely the "independent basis for interpretation" which the Appellate Body has described as incorrect, and operates to circumvent the requirement in DSU Article 3.2 that Dispute Settlement Body rulings cannot add to or diminish the rights and obligations provided in the covered agreements. If every "relevant" SCM Agreement provision applied to every other SCM Agreement provision (*mutatis mutandis*) unless the application created "a situation of conflict", the purely theoretical questions of what is "relevant" and what creates "a situation of conflict" would become the focus of every WTO dispute. The EC's approach ignores a fundamental tenet that where the Members wished to have explicit obligations set forth in one provision apply in another context, they did so expressly. [3] If

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[1] *See, e.g.*, EC responses to Panel Questions 5(a) and (b).

[2] *Japan – Taxes on Alcoholic Beverages*, p.11, n.20 ("[T]he treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation.").

[3] Article 21 itself illustrates this point in paragraph 4, which makes the provisions of Article 12 applicable to Article 21.3 reviews, and in paragraph 5, which expressly makes the provisions of Article 21 applicable to Article

(continued...)

accepted, the EC's approach would result in the nullification the Members' expectations as *explicitly* expressed in the SCM Agreement.[4]

5. Turning now to the EC's answers to specific questions, with respect to Question 1(a), the EC has applied its treaty interpretation approach to the Panel's question as to whether the Article 11.9 *de minimis* standard applies to reviews under Article 21.2. The result is that, according to the EC, sometimes Article 11.9 is applicable to reviews under Article 21.2 and sometimes Article 11.9 is not applicable to reviews under Article 21.2. According to the EC, whether Article 11.9 is relevant in Article 21.2 reviews is dependent on the purpose of the review. This type of analysis combines the worst of the EC's relevance- and purpose-based treaty interpretation approach and results in what is certain to be the standard answer to this type of inquiry based on the EC's approach: it depends.[5]

6. With respect to Questions 1(b) and (c), the EC's answers reflect reliance on assumptions concerning the purpose of the negligibility standards and its interpretation theory that every provision can be considered applicable to every other provision barring explicit conflict. However, as the United States demonstrated in its responses to the Panel's questions, neither the text of the SCM Agreement nor the practicalities associated with conducting a five-year review support the EC's view that a negligibility test is required under Article 21.3. Furthermore, even under the EC's proposed approach towards negligibility, the EC recognizes that there must be a demonstration that the amount of the subsidy "is not going to increase above [the current] level or that imports would not rise above *de minimis* upon removal of the measure." Thus, the EC and the United States are in concurrence that current subsidy or volume levels by themselves, without a prospective inquiry into likely future levels, are not sufficient to require termination of an order.

7. The EC's answer to Question 1(d) relies upon what it claims is "an irrefutable presumption" as to the purpose of the *de minimis* and negligible import standards. The EC again purports to discern a purpose without reference to the text of the SCM Agreement. The EC then refers to obligations not found in the text which presumably derive from this "purpose" (*i.e.*, according to the EC, these standards must apply in sunset reviews under Article 21.3). As the United States demonstrated in its answers to the Panel's questions, by their very terms, Articles 27.10 and 27.11 apply only in investigations. The EC's use of "purposes" as an

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18 undertakings. Examples of provisions that apply in other contexts include: the definition of "subsidy" in Article 1 ("For the purpose of this Agreement"); the definition of "interested parties" in Article 12.9 ("for the purposes of this Agreement"); calculation of the amount of a subsidy under Article 14 ("For the purpose of Part V"); definition of "injury" under Article 15 and footnote 45 ("Under this Agreement"); definition of "like product" under footnote 46 ("Throughout this Agreement"); definition of domestic industry in Article 16 ("For the purposes of this Agreement"); definition of "levy" under footnote 51 ("As used in this Agreement").

[4] *See Japan - Taxes on Alcoholic Beverages* ("*Japan Taxes*"), page 19 (discussing how the "omission" in Article III:2 of GATT 1994 to the general principle in Article III:1 "must have some meaning").

[5] *See also* EC's response to Panel Question 12(c).

independent basis for interpretation in this case is incorrect and results in imputation into the SCM Agreement of "words that are not there.[6]

8. With respect to the EC's answers to Questions 2, 4, 9, and 13(b), the United States notes that the EC's responses fail to address the phrase "in a review initiated . . . on their own initiative" contained in Article 21.3. The EC merely restates its argument that the evidentiary prerequisites of Article 11.6 apply to sunset reviews under Article 21.3. As demonstrated in the United States First Written Submission (paras. 60-62), the right of an authority to initiate a sunset review on its own initiative, as explicitly stated in Article 21.3, is unqualified. Whether a Member chooses to initiate a sunset review in every case through self-initiation or to initiate a review only in response to a "duly substantiated request" from the domestic industry is a decision that the plain text of Article 21.3 leaves to the Members.

9. With respect to the EC's answers to Questions 3, 11, and 13(b), the EC's answers either assume or specifically claim that Commerce self-initiates sunset reviews "without any shred of evidence." The EC is wrong. The results of the original countervailing duty order and of the most recent administrative reviews, if any, in general can be considered evidence of the existence of subsidization. The EC's argument that something more is required prior to initiation of a sunset review amounts to an argument that an authority must conduct the review before it initiates the review.

10. With respect to the EC's answers to Questions 5 and 6, the United States demonstrated above that the EC's approach to treaty interpretation (*i.e.*, any provision is in principle applicable *mutatis mutandis* to any other provision) is not consistent with customary rules of treaty interpretation. At the very least, the EC's response to these questions demonstrates the futility of relying on the EC's approach to interpret the meaning of the words contained in Article 21.3. According to the EC, Members may not rely on the plain text of the SCM Agreement to determine their obligations. Instead, the "object and purpose" of the SCM Agreement – as identified, of course, by the EC – trump the text of the Agreement.

11. In the *US Shrimp* case, the Appellate Body rejected this type of unconventional approach to treaty interpretation, stating as follows:[7]

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text

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[6] *See India Patent Protection*, para. 45.

[7] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 114 (footnote omitted).

> itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

Thus, while the object and purpose of an agreement can be instructive in interpreting the text, the object and purpose cannot be used to override the text. In other words, object and purpose cannot be used to write into the text "words that are not there."[8]

11. In its response to Question 14, the EC suggests that Commerce did not exercise due diligence in refusing to consider the calculation memorandum from the original investigation. As the United States demonstrated in its First Written Submission (paras. 102-105), the calculation memorandum was not on the administrative record of the sunset review because the German producers failed to place it there in a timely fashion. Although cited by the EC as such, the Appellate Body's decision in *Pakistan Yarn* does not stand for the proposition that "new" evidence should be considered by a Panel in a dispute. The EC emphasizes that in *Pakistan Yarn* the Appellate Body addressed only the question of whether the Panel should have considered extra-record evidence consisting of facts that were not in existence at the time the administrative determination was made and hence could not have been known. However, that was because the United States specifically limited its appeal to the issue of whether a panel can consider evidence that was not in existence at the time of the national authority's determination. As the United States demonstrated in its First Written Submission (paras. 49-51), similar restrictions apply with respect to a panel's review of other types of extra-record information. Nothing in *Pakistan Yarn* or other Appellate Body or adopted Panel reports suggests that the restrictions on a Panel's review of evidence would not likewise apply with respect to properly-rejected information that had existed at the time the authorities made their determination.

12. In response to Question 15, the EC asserts that Commerce systematically "refuses" to change the rate from the original subsidy rate determined in the investigation. The EC is wrong. In the instant case, Commerce in fact agreed with the EC and the German producers that two programs had been terminated with no continuing benefits. Commerce, therefore, adjusted the net countervailable subsidy rate accordingly.[9] More importantly however, the United States would point out that, as demonstrated in our First Written Submission (70-87), nothing in the SCM Agreement requires consideration of the magnitude of subsidization in determining the likelihood of continuation or recurrence of subsidization.

13. Question 18 addresses the evidentiary and procedural aspects of Commerce's sunset review. The EC's response to this question is disingenuous and misleading. As a general

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[8] As another blatant example of the EC's efforts to rewrite the text of the Agreement, the United States notes that throughout its responses (*e.g., EC Responses to Questions 9, 12, 14, 15, 16(a) and 16(b)),* the EC misquotes the text of the Agreement by inserting a "causality" test into Article 21.3. Aside from the EC's obvious misquoting of the Agreement, the United States finds this particularly troublesome given that the injury-related aspects of the United States' action are not within the terms of reference in this dispute.

[9] *See Sunset Calculation Memorandum*, p.1 (Exhibit EC-8).

matter, and as discussed in greater detail in the United States' First Written Submission (paras. 14-23, 109-116), Commerce's sunset review followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Articles 21 and 12. The EC is wrong when it claims that the respondent interested parties, including the German producers, "were not given *any* opportunity" to present all evidence which they considered relevant in the sunset review. (Emphasis added). If the respondent interested parties failed to *gather and prepare* evidence during the 15 months prior to the scheduled initiation of the sunset review, they have only themselves to blame. Contrary to the EC's response, the United States never suggested that respondent interested parties could *submit* this information prior to initiation of the sunset review.

14. The EC's assertion that sunset information requirements were "vague" or "perfunctory" is also wrong. Fifteen months before initiation of the sunset review, the statutory requirements, the regulatory requirements (including the standard questionnaire), and Commerce's extensive *Sunset Policy Bulletin*, providing detailed guidance on methodological and analytical issues not explicitly addressed by the statute and regulations, were all available to respondent interested parties. Again, if the parties' failed to review and consider the guidance provided in these documents in preparation of their submissions, they have only themselves to blame. Finally, the EC's assertion that the respondent interested parties did not have access to the evidence presented by the other parties in the sunset review is simply false. Commerce's regulations require service of all submissions on all parties to the proceeding; there is no evidence that the parties did not do so in this case.